STATE OF MICHIGAN

COURT OF APPEALS

TREETOPS ACQUISITION CO, LLC, Petitioner-Appellee,	UNPUBLISHED January 16, 2014
v	No. 313173 Tax Tribunal
TOWNSHIP OF DOVER, Respondent-Appellant.	LC No. 00-316763

Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Respondent appeals by right from the Michigan Tax Tribunal's October 12, 2012 order awarding petitioner, Treetops Acquisition Company, LLC, costs and fees based on a finding that respondent's defense was frivolous. For the reasons set forth in this opinion, we affirm.

I. FACTS

On June 23, 2005, petitioner filed the instant appeal, challenging respondent's 2005 assessment of ten parcels of real property and one parcel of personal property. The property is a 2,800 acre ski and golf resort. As the case progressed, petitioner moved to amend its petition to include assessments for the 2006 through 2011 tax years, and the case was placed in abeyance pending a decision in the parties' 2004 tax year appeal. See *Treetops Acquisition Co, LLC v Township of Dover*, unpublished per curiam opinion of the Court of Appeals, issued April 20, 2010 (Docket No. 288428) (*Treetops I*).

On February 22, 2011, this case was taken out of abeyance and given a January 6, 2012 due date for valuation disclosures and prehearing statements. Respondent filed its valuation disclosure with the tribunal on January 17, and petitioner filed its valuation disclosure with the tribunal on February 22, 2012. A hearing regarding the 2005 through 2011 tax years was subsequently held.

At the hearing, respondent's assessor, Sally Nowak, testified regarding the true cash value of the 11 parcels. Nowak discussed her valuation disclosure, which was entered into evidence. Nowak's valuation disclosure considered a market approach, income approach, and cost approach, and Nowak concluded that the market approach was the most reliable indicator of value. Regarding the market approach, Nowak used the 2002 purchase price and added $3,180,000 for deferred maintenance and then deducted $3,725,800 from her adjusted purchase

price for property that was part of the purchase but not at issue in the appeal, to arrive at a true cash value conclusion for the 2005 tax year of $20,354,200.[1]

Petitioner called John Widmer, a certified real estate appraiser who had appraised eight golf courses in the past five years, to testify regarding the true cash value of the property at issue. In valuing the property, Widmer also considered a market approach, income approach, and cost approach, concluding that the income approach was the most reliable indicator of value because the property had various profit centers that provided income. Widmer valued the property as a whole at $4,729,846 for the 2005 tax year and then allocated that value to eight of the ten parcels. He separately valued the two parcels of forest land at $1,800,000 total for the 2005 tax year. His value conclusion for these ten parcels for the 2005 tax year was $6,529,846.[2] At the close of the hearing, petitioner requested that it be awarded costs and fees incurred in bringing the appeal.

The tribunal issued a 28-page written opinion on September 5, 2012, holding that the true cash value of the property was $13,975,500 for the 2005 tax year.[3] The tribunal relied substantially on petitioner's valuation disclosure in determining these values. The tribunal also held that petitioner was entitled to costs and fees incurred in bringing the appeal, because petitioner was the "prevailing party" and respondent's "position" was frivolous. Respondent filed a motion for reconsideration, asserting that petitioner cannot be considered a prevailing party entitled to costs because the tribunal did not adopt petitioner's value contentions, and that respondent's assessments and defense were not frivolous. The tribunal rejected respondent's arguments, and this appeal followed.[4]

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[1] Nowak's valuation disclosure states that the "market remained flat from 2002 through approximately 2007 assessments" but then dropped "on average 10% per year" for the 2008, 2009, 2010, and 2011 assessments. Accordingly, her true cash value conclusion was $20,354,200 for 2006 and 2007, $18,318,780 for 2008, $16,486,902 for 2009, $14,838,211 for 2010, and $13,354,389 for 2011.

[2] Widmer did not value the personal property parcel because petitioner accepted the assessed value of $4,885,500 for the 2005 tax year. With this figure included, the total value for all eleven parcels would be $11,415,346 for the 2005 tax year.

[3] The tribunal held that the true cash value of the property was: $12,827,300 for the 2006 tax year; $12,001,900 for the 2007 tax year; $10,199,300 for the 2008 tax year; $8,037,500 for the 2009 tax year; $6,717,600 for the 2010 tax year; and $6,702,200 for the 2011 tax year. The tribunal subsequently reduced these values by approximately $5,000.

[4] Respondent subsequently filed a motion with this Court to stay the tribunal proceedings concerning the calculation of petitioner's fees and costs. This Court granted respondent's motion on November 5, 2011.

II. ANALYSIS

A. TRUE CASH VALUE

This Court "review[s] whether the Tribunal 'made an error of law or adopted a wrong principle.'" *Pontiac Country Club v Waterford Twp*, 299 Mich App 427, 437; 830 NW2d 785 (2013), quoting *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527-528; 817 NW2d 548 (2012). This Court "must accept the Tribunal's factual findings if 'competent, material, and substantial evidence on the whole record' supports them." *Id.* at 434, quoting Const 1963, art 6, § 28. "Substantial evidence supports the Tribunal's findings if a reasonable person would accept the evidence as sufficient to support the conclusion." *Id.*

Respondent argues that the tribunal failed to recognize and value approximately 343 acres of land surrounding the golf courses that has been reserved for residential development. The 343 acres at issue are spread among four tax parcels. In valuing these 343 acres, Widmer testified that there is no demand for the development of the property and thus he did not value it separately:

> *Q.* When you say you didn't consider it in your valuation, did you not consider it as excess land? You didn't consider it as excess land. Correct?
>
> *A.* I included it. I included it simply as part of the larger development, and that's it. The carry cost, I did not want to separate or allocate to that 343 acres, because then it becomes an issue how much insurance goes to that compared to the golf course, how much tax carry would go to that land versus the golf course.
>
> It's part of the golf course. At some point in time we all hope that it could be usable, but not in the foreseeable future. Therefore I did not value it as vacant land.

The tribunal valued the four parcels containing the 343 acres, relying on Widmer's valuation disclosure to determine the appropriate value of the four parcels. Because Widmer did not separately value the 343 acres, the tribunal likewise did not separately address these 343 acres in its opinion. It did, however, value each of the four parcels, which, again, included the 343 acres. There is no indication that the tribunal failed to include the 343 acres in its valuation of these four parcels. Thus, respondent's argument that the tribunal failed to recognize and value the 343 acres is without merit. The tribunal did not err in applying the law or adopt a wrong principle, and the tribunal's determination of the property's value is supported by competent, material and substantial evidence on the whole record.

B. FEES AND COSTS

Respondent argues that the tribunal erred in granting petitioner's motion for fees and costs because (1) petitioner was not a prevailing party, and (2) respondent's defense not was frivolous.

1. PREVAILING PARTY

"This Court reviews for an abuse of discretion a court's ruling on a motion for costs to the prevailing party." *Pontiac Country Club*, 299 Mich App at 437. "We generally review de novo whether a party was a 'prevailing party,' because it is a question of law. But when a party does not dispute the facts or allege fraud, we review whether the Tribunal 'made an error of law or adopted a wrong principle.'" *Id*., quoting *Mich Props, LLC*, 491 Mich at 527-528.

MCR 2.625(B) provides "**Rules for Determining Prevailing Party.** The use of the singular term "party" throughout the subsection indicates that the rules assume the existence of one prevailing party. "When a single cause of action is alleged, the prevailing party is 'the party who prevails on the entire record.'" *Pontiac Country Club*, 299 Mich App at 437-438, quoting MCR 2.625(B)(2). "The party need not recover the full amount of damages that he or she requested. But the party 'must show, at the very least, that its position was improved by the litigation.'" *Id*. at 438, quoting *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d 150 (1998).

In this case, the tribunal ruled that the true cash value of the property was over-assessed by more than $14,000,000 in each tax year under appeal. Petitioner requested a decrease in the taxable value of the property and received a decrease. Its position thus improved as a result of the litigation. In contrast, respondent's pre-litigation position was that the true cash value of the property was considerably higher than the value established in litigation. Respondent's pre-litigation position was not improved in any way by this litigation.

Respondent argues that petitioner was not a prevailing party because it failed to obtain its contended valuation and the tribunal determined a true cash value more than twice what petitioner requested at the hearing. Respondent argues that if any party is to be considered the prevailing party, it should be respondent.

In essence, respondent is arguing that because petitioner did not get all the relief it argued for, respondent was actually the prevailing party. Such an argument is devoid of merit and contrary to law." *Pontiac Country Club*, 299 Mich App at 438. Simply because petitioner did not obtain all the relief it requested does not preclude petitioner from being the prevailing party, as petitioner's post-litigation position represents a dramatic improvement from its pre-litigation position. *Forest City Enterprises*, 228 Mich App at 81.

As for respondent's assertion that it improved its position by defending the case, its focus is again misdirected. It is true that the tribunal's aggregate valuations were higher than those advanced by petitioner. But the benchmark for determining if petitioner prevailed is the assessed taxable values reflected on the tax roll for the years at issue. It is this amount being contested by petitioner. That respondent essentially conceded that the values were inflated does not change the focus of petitioner's claim.[5] Absent the litigation, the established value of the property

[5] This is not a situation where respondent asserted a counterclaim, which arguably could mean the tribunal should have considered the net judgment. See, e.g., *Don Cartage Co v US*, 289 F2d 623, 627 (CA 6, 1961). But see *Fletcher Hill, Inc v Crosbie*, 178 Vt 77, 82-83; 872 A2d 292 (2005).

would have been considerably higher. Thus, it is clear that respondent did not benefit from this litigation. It is equally clear that petitioner did benefit from this litigation because the litigation established a value for the property lower than what the established value would have been had the litigation not occurred.

Respondent also notes that the tribunal left respondent's assessment for one parcel completely intact (the personal property parcel), finding that petitioner had conceded to respondent's valuation of that parcel. Although respondent is correct that petitioner conceded to respondent's assessment for the personal property parcel, that fact does not prevent petitioner from being a prevailing party "on the entire record." Accordingly, the tribunal did not err in applying the law and did not adopt a wrong principle when it determined that petitioner was a prevailing party. Respondent is therefore not entitled to relief on this issue.

2. FRIVOLOUS DEFENSE

In *Pontiac Country Club*, 299 Mich App at 438-439, this Court provided the applicable standard of review, as follows:

> Generally, when reviewing whether an action is frivolous under MCR 2.625(A)(2), this Court reviews for clear error a trial court's finding that an action is not frivolous, because whether a party's claim is frivolous in a specific case is a question of fact. However, this case involves a finding by the Tribunal. And we must affirm the Tribunal's findings of fact if competent, material, and substantial evidence on the record supports them. We conclude that we must affirm the Tribunal's finding concerning whether a claim was frivolous unless competent, material, and substantial evidence does not support the finding. [Footnotes containing citations omitted.]

A court may find that a party's action is frivolous under MCR 2.625(A)(2) when at least one of the following conditions is met:

> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit. [MCL 600.2591(3)(a).]

The tribunal's decision was based on MCL 600.2591(3)(a)(*ii*) and (*iii*).

Respondent is correct that the tribunal seemed to rely on the frivolousness of respondent's initial assessment rather than on the frivolousness of respondent's defense during

the proceedings before the tribunal.[6] But it is the frivolousness of respondent's defense during the proceedings before the tribunal that matters, not the initial assessment, because the proceeding before the tribunal is the sole proceeding that would allow for an award of costs and fees. MCL 600.2591(1) (limiting an award of costs and fees to a "civil action or defense to a civil action"). Similarly, respondent is correct that its assessment for the 2005 tax year pre-dated this Court's decision in the 2004 tax year appeal (*Treetops I*), and thus respondent could not have accounted for this Court's decision in its assessment for the 2005 tax year. However, the Court's decision in the 2004 tax year appeal predated the tribunal proceedings for the 2005 through 2011 tax years, and thus respondent could and should have accounted for that decision when presenting its valuation disclosure and defense before the tribunal in the instant case.

In this regard, as noted by the tribunal in its decision to award costs, respondent's valuation disclosure added $3,180,000 to the value of the property for deferred maintenance, and respondent likewise argued at the hearing that the $3,180,000 for deferred maintenance should be included in the value of the property. Respondent made this argument despite this Court's ruling in *Treetops I* which held that the tribunal committed an error of law and applied a wrong legal principle when it added the deferred maintenance costs. *Treetops I*, unpub op at pp 2-3 ("With no other evidence in the record about the deferred maintenance costs, we conclude that the tribunal erred in [concluding that these costs should be added to the purchase price].")

Respondent is correct that this Court's decision in *Treetops I* would not necessarily prevent it from adding the deferred maintenance costs to the value of the property. That is, if respondent had *new* evidence regarding these costs, including these costs would not be at odds with this Court's decision in *Treetops I*, because the basis for that decision was insufficient evidence. However, this is not what happened. Nowak testified at the hearing that she did not have any evidence that was not part of the record in the 2004 tax year appeal:

> *Q.* Yes or no, Ms. Nowak, the Court of Appeals ruled [in *Treetops I*] that the Tribunal should not have added the $3,180,000 in deferred maintenance to the purchase price?
>
> *A.* The Court of Appeals ruled that there was insufficient evidence.
>
> *Q.* Thank you, Ms. Nowak, and you determined that notwithstanding that ruling, you should add it back into the purchase price years later. Correct?
>
> *A.* I determined that there was evidence now to show that those improvements were made after purchase.
>
> *Q.* And what evidence did you have to show that?

[6] Respondent's assessment for the 2005 tax year was $30,692,300, but respondent asserted in its valuation disclosure that the value for the 2005 tax year was $20,354,200.

A. I have the Answers to the Interrogatories from the Petitioner stating that they could—

Q. In what case, Ms. Nowak? When did you obtain those Answers to Interrogatories?

A. I obtained them in the previous Tribunal case from 2004. [Emphasis added.]

Here, where respondent's position before the tribunal was at odds with this Court's decision in *Treetops I*, such a position is necessarily "devoid of arguable legal merit." MCL 600.2591(3)(a)(iii).[7] Accordingly, the record supports the tribunal's finding that respondent's defense was frivolous.

We affirm, and lift the stay imposed by this Court in our November 6, 2012 order. Petitioner, being the prevailing party, is entitled to costs. MCR 7.219(A).

/s/ Donald S. Owens
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

[7] The tribunal explained, as follows:

> This issue was litigated in *Treetops I* and Respondent lost on this issue. Taken as a whole, Respondent's assessment of the subject and defense throughout this appeal does not evidence a good faith dispute as to the value of the property, but Respondent's dissatisfaction with the results in the prior litigation.